# Authority and Representation

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# AUTHORITY AND REPRESENTATION

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ABSTRACT. The act of 'setting the law' enjoys a central position in Kelsen's theory of authority. His analysis of this act criticizes, amongst others, the assumption of natural-law doctrines that norms are objective when they duplicate a content given directly to cognition and independently of the act whereby the norm is enacted. Correctly, Kelsen attacks the concept of representation underlying this assumption as an example of metaphysical dualism and a copy theory of knowledge. Does, then, an alternative understanding of authority require scrapping representation from a theory of positive law? Or does it require interpreting representation differently? Following the second path, this paper reconstructs the act of setting the law in terms of the critical concept of representation developed by Ernst Cassirer and suggests how, thus reconstructed, the structure of this act can account for the law's authority and its contingency.

## INTRODUCTION

The term 'authority' is commonly used in one of two ways in the law, namely when referring to individuals empowered by the legal order – legal authorities – or to the law's objectivity – the authority of the law. Although apparently disparate, these two meanings of authority are intimately connected, a connection that Kelsen highlights by insisting that all law is valid as posited law. Drawing attention to the act of positing the law suggests, on the one hand, that understanding what legal authority is requires analyzing what it does. For what legal authorities do is to posit, set, the law. On the other hand, setting the law sheds light on the authority of law: validity is a quality accruing to the law as posited law. In a word, positing the law yields the key to the act of legal objectivation.

Kelsen correctly recognizes that legal objectivation is an act of law application and law creation. But by arguing that application concerns the higher-level norm and creation the lower-level norm, the Pure Theory of Law inadvertently repeats the metaphysical and

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epistemological presuppositions of the doctrines of natural law it aimed to overcome. This paper argues that moving beyond natural-law doctrines requires recognizing that law-setting is a dialectical act: positing a norm transforms, to a lesser or greater extent, the applied norm. Radicalizing Kelsen's insight into the twofold character of legal objectivation demands understanding that setting the law at once applies and creates, represents and presents, the *higher-level norm*.

This idea will be developed in three steps. Section 1 examines the opposition between natural-law doctrines and the Pure Theory, suggesting that Kelsen's analysis of law-setting does not resolve the problem of representation inherited from natural-law doctrines. Section 2 reconstructs the act of positing the law in the framework of a critical concept of representation, arguing that this act is dynamic in a far more radical sense than that envisaged by Kelsen. Finally, section 3 explores in what way the dynamic – dialectical – character of law-setting can address the central problem confronting the concept of authority in a theory of positive law: given the contingency of the law, how can we meaningfully distinguish between objectivity and subjectivity?

## 1. SETTING THE LAW AS REPRODUCTION

Despite their differences, theories of natural law and the Pure Theory of Law agree that legal objectivation is an act of norm application. One might expect, therefore, that their polemic would focus on the following question: What does it mean to apply a norm? Natural-law doctrines do, indeed, address this question head-on: to apply a norm is to represent its normative content. In a relentless critique of these doctrines, Kelsen shows that the concept of representation they endorse is untenable. But instead of interpreting application and representation in a new way, the Pure Theory of Law shifts the terms of the polemic: What norm must be applied, such that posited norms can be viewed as objective? As a result of this changed set of problems, the Pure Theory falls short of providing a viable alternative to the concept of legal objectivation endorsed by natural-law doctrines.

### 1.1 *The 'Faktum' of the Law*

Let us take our point of departure in what might be called the *Faktum* of the law: legal norms do not 'stand alone'; they stand in relation to each other. This has nothing to do with the empirical fact that any imaginable human society is too complex to be successfully regulated by a single legal norm. The fact that legal norms do not stand alone expresses a conceptual rather than an empirical truth. It means that a single legal norm would simply not be a legal norm. The relational character of legal norms constitutes these norms as such.

What, then, is the nature of the relation between legal norms? In what way, for example, is a tax inspector's order for payment related to an administrative regulation concerning income taxes, and, in turn, the administrative regulation to an income-tax law? One way of answering this question appeals to *application*. The order for payment is an application of the administrative regulation, and the regulation an application of the income-tax law. From this perspective, the term 'relation' has an ontological and an epistemological import. Ontologically, i.e. in terms of the mode of existence of legal norms, conceiving of the relation between norms as applicative means that a norm is given – exists – as instancing another norm. Otherwise put, the objectivity of a legal norm, its mode of existence, implies that it is 'derived' from, 'grounded' in, another norm. Epistemologically, i.e. in terms of the cognition of legal norms, conceiving of the relation between these norms as applicative means that we cognize a norm as particularizing another normative content. To cognize a tax inspector's order for payment, for example, means that its content is held to apply a general normative content, namely the apposite administrative regulation.

Let us carry the analysis a step further: relation as application means that the norm *at hand* instances a norm that is *not* at hand. In the example, the legal authority's order for payment must be 'backed up' by the regulation. The expression 'backed up' indicates, first, that the order for payment is authorized by the regulation. It also suggests that the regulation stays 'in back of' the order for payment. This 'staying in back of' implies that the regulation is given only *indirectly*, i.e. through the order for payment. Certainly, the administrative regulation can become the object of discussion (i.e. come to

'the fore') in another context. But we are confronted with the same phenomenon: as a legal norm, the regulation must be 'backed up' by yet another norm, the income-tax law enacted by the legislative.

'Back' and 'fore' are spatial metaphors of an elementary, but crucially important feature of the law: that a legal norm does not 'stand alone' means, positively expressed, that it *stands for* another norm. Succinctly, relation as application implies that legal norms possess a representational structure. Ontologically, a legal norm is present – exists – as representing another norm; herein lies its claim to objectivity or validity. Epistemologically, to cognize a norm is to view its content as representing another normative content. We see the regulation in the tax inspector's order for payment, or the income-tax law in the regulation, because legal norms exemplify the general structure of representation: seeing the absent in the present.

This insight impinges on the view that the law is a hierarchical order of norms; a norm is 'lower' because it *represents* a 'higher' norm. The hierarchical relation between 'higher' and 'lower' norms is another way of expressing the idea that norms have a representational structure. In terms of content, the progression from lower to higher norms takes us from the particular to the more general. The tax inspector's order for payment is particular with respect to the administrative regulation, which is itself particular with respect to the income-tax law. This law is also particular, namely with respect to a certain value. For example, a redistributive income-tax law represents a determinate conception of a just society, a flat-rate income-tax law another. To be sure, political actors can contest the generality of the values represented in legal norms, showing that these norms embody a merely particular interest. The important point, however, is that political opposition questions the representativity of posited norms, not the representational character of legal norms as such. From this perspective, a constitution is the institutional framework within which a 'conflict of representations' can take place.

At the end of this paper I will return to this point and elaborate on the problem of the generality of the values positivized in the law and on the 'conflict of representations.' This problem, as we shall see, is closely bound up with the question whether the relation between legal norms is only applicative, as assumed hitherto. For

the moment, however, let us concentrate on the legal representation of values: What is the ontological and epistemological status of such values? Do they exist independently of the legal norms that represent them? Can they be known directly, i.e. without recourse to their legal representations?

### 1.2 *Natural-Law Doctrines*

Natural-law theories come into the picture at this point. For they answer, implicitly or explicitly, the question about the status of the values represented by a legal order. Ontologically, natural-law theories argue that such values enjoy an existence independent of the order itself. Epistemologically, they assert that their normative content can be known immediately, i.e. without the mediation of the legal order and its norms. Enter Kelsen. One of his great merits as a legal philosopher is to have unmasked the ontological and epistemological presuppositions of natural-law doctrines.

These doctrines, as Kelsen realized, are not the product of any especially gifted flight of the imagination. On the contrary, natural law is the 'natural' attitude toward the law. This attitude is a variation on what might be called the naive, uncritical, explanation of objectivity. This naive explanation rests, first, on metaphysical dualism. In the domain of values, the domain apposite to the law, this dualism manifests itself in the distinction between transcendent values and empirical values.[1] From the viewpoint of natural-law doctrines, empirical values are not merely conditioned; they are conditioned by values possessing a reality independent of the law.

This brings us to the second of the presuppositions of natural-law doctrines, which Kelsen calls 'the copy theory' (*Abbildtheorie*) of knowledge. These doctrines assume that the direct cognition of values existing independently of all legal normativity enables their legal positivization. In other words, natural-law doctrines conceive of legal objectivity as being *purely reproductive*: a legal norm 'stands for' a higher-level norm because it copies an original, a

[1] See Hans Kelsen, "Natural Law Doctrine and Legal Positivism", trans. Wolfgang H. Kraus, as an appendix to Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York: Russel & Russel, 1945; hereafter: *NLD*), pp. 389–446, p. 420.

normative content given directly to cognition.[2] By implication, applying a higher-level norm means duplicating its content in a lower-level norm. Hence, the given is first and foremost the content of the value 'in itself.' Earlier, however, when discussing the representational structure of legal norms, we saw that these were given – present – as related to a higher norm, which was only apprehended indirectly. But here, confronted with the question concerning the epistemological status of the values represented by legal norms, natural-law theories abandon entirely the domain of law, assuming that these values can be cognized *directly*, absolutely. In other words, the values represented by the legal order are viewed as given without the mediation of legal norms, as sheer presence. Notice the inversion that has taken place with regard to our foregoing analysis concerning the *Faktum* of the law: natural-law doctrines postulate the *priority of presence over representation*.

This postulate has a direct bearing on the concept of objectivity. By postulating the existence of transcendent values given directly to cognition, such doctrines aim to provide a fixed 'measure' or standard for judging the content of positive law. If the content of positive law represents the content of such values, a positive legal order is objective; if it does not, positive law is subjective. In short, by postulating that the aforementioned values can be known directly, natural-law doctrines aim to assure legal authorities of an indubitable fulcrum for legal application. Crucially, the priority of presence over representation is not limited to the values transcendent to the law. Once these values have been grasped in all their immediacy, natural-law doctrines assume that each of the acts of applying legal norms unfolds the same logic: the norm enacted by a legal authority is objective when it duplicates a normative content given directly to cognition. Consequently, the postulate of values 'in themselves' is only the *borderline case* of a more general presupposition, namely that the ground of a legal norm, whether a higher-level legal norm or the values positivized in the law, exists independently of the norm and can be known directly.

As Kelsen correctly notes, the central problem confronting natural-law doctrines is that the content of the 'natural order,' which is supposed to function as the measure of the objectivity of positive

[2] See *NLD*, p. 420.

law, is itself the object of deep and ineradicable social conflict. Although natural-law doctrines ascribe a 'directly evident quality' to the natural order,[3] political reality ensures the swift demise of this postulate, for every allegedly directly evident value can be, and invariably is, countered by a competing value. As Kelsen puts it, the representatives of natural law "have not proclaimed *one* natural law but *several* very different natural laws conflicting with each other."[4] Accordingly, the conflict between natural-law doctrines makes manifest precisely what they separately attempt to conceal, namely that any and every legal order embodies a *particular* set of values. Against the ideological function of such doctrines, Kelsen argues that a theory of legal objectivity and objectivation can only be credible if it accommodates the contingency of the law.

### 1.3 *A Double Ambiguity in the Pure Theory of Law*

Having exposed the shortcomings of natural-law doctrines, Kelsen seeks to account for objectivity and objectivation in the framework of the Pure Theory as a theory of positive law. Yet, before turning to examining the Pure Theory, we must understand the challenge it has to meet. The foregoing analysis suggests that natural-law doctrines are, first, a *unified theory of norm application*, for they correctly recognize that the act of norm application has a single structure, regardless of the level of generality of the norms applied by legal authorities. Natural-law doctrines are, second, a *theory of representation*, as they rightly perceive that to apply a norm is to represent it. Consequently, Kelsen must explain the role of norm application and representation in the act of legal objectivation without falling prey to the ontological and epistemological presuppositions of natural-law doctrines. Does the Pure Theory meet this double challenge?

The key to overcoming natural-law doctrines is, in Kelsen's view, the theory of the basic norm and, connected to it, the analysis of law-setting. We must turn, therefore, to these two contributions

[3] Hans Kelsen, *Introduction to the Problems of Legal Theory*, 1st edn. of *Reine Rechtslehre*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992; hereafter: *PTL1*), p. 55.

[4] Hans Kelsen, *The Pure Theory of Law*, 2nd edn. of *Reine Rechtslehre*, trans. Max Knight (Berkeley, CA: University of California Press, 1970; hereafter: *PTL2*), p. 220.

to establish whether the Pure Theory acquits itself of the double challenge posed by natural-law doctrines. The results, on closer examination, are ambiguous.

Consider, first, Kelsen's theory of the basic norm. Rather than rehearsing this theory at any length, an enterprise that has intensively occupied Kelsen scholarship, let us instead focus on the aspect decisive to our inquiry, namely the view on authorization germane to the basic norm. Kelsen notes that a norm can authorize the organ entitled to enact a norm, the procedure for its enactment, or the content of the enacted norm. While the third of these – material authorization – plays an important role in validity, he contends that it does not function as the ultimate criterion of validity. At a minimum, a norm must determine the *organ* authorized to posit norms. Conversely, this minimum is sufficient to speak of norm application and, consequently, of valid norms. "[L]aw creation must be understood as law application, even if the higher norm determines only the personal element, the individual, who has to render the law-creating function."[5] Accordingly, the Pure Theory views the ground of a legal order as doing no more than conferring normative power on an organ. "[T]he basic norm is limited to authorize a norm-creating authority, it is a rule according to which the norms of this system ought to be created."[6]

The upshot of this threefold distinction is that, from the point of view of legal science, the objectivity of the law does not depend on the alleged generality of the values applied in the enactment of general legal norms. The basic norm 'brackets' these values in the sphere of legal science, relegating their application to the domain of legal politics. Kelsen's move, though bold, is inconclusive. Even if one grants for the sake of argument that the objectivity of a general legal norm does not depend on its representing a value, once a value has been positivized in a general legal norm, this norm's content conditions the objectivity of the individual norms that represent it. By then, the Trojan horse of representation has been wheeled into positive law. For what is the ontological and epistemological status of the general norm with respect to the individual norms that

[5] *PTL2*, p. 235.
[6] *PTL2*, p. 197.

represent it?[7] Metaphysical dualism and the copy theory of law are not restricted to the application of a 'metajuridical' value; precisely because the 'natural' attitude towards the law, they can also be the presuppositions of what it means to say that a norm of positive law is the application of a higher-level legal norm. Hence, the basic norm only *postpones*, without resolving, the problem of representation. Rather than addressing the question, 'What is norm application?', the basic norm responds to the following query: 'What norm, when applied, lends a legal order objectivity?'

This reductive strategy has a second weakness. Assuming there is a concept of norm application that could overcome metaphysical dualism and the copy theory of knowledge in the process of applying general legal norms, would it not hold *a fortiori* for the process of applying values? A solution to the problem of the application of normative contents must be general; if such, this solution also encompasses the application of values. Here, then, is the rub: the contrast between natural-law doctrines and a theory of positive law is not the contrast between two competing conceptions of the basic norm, but between two competing conceptions of norm application and representation. From this perspective, the ground of the legal order has no epistemological or ontological priority for a theory of positive law; it is only a borderline case of a more general problem, namely the representational structure of legal norms. By focusing on the basic norm, Kelsen conceals the general problem of representation and, concealing it, leaves it unresolved.

Consider Kelsen's second main contribution to a theory of positive law, the analysis of the act of setting the law. In a one-liner that could well count as the manifesto of legal positivism, he states: "The law is valid only as positive law, that is, only as law that has been issued or set."[8] Kelsen convincingly argues that the act of setting a norm possesses a general structure, effectual in the enactment of statutes and administrative regulations as much as in

[7] This problem also holds for what Kelsen calls 'formal' authorization. In effect, the basic question is not what distinguishes 'formal' from 'material' authorization, but what authorization is as such, i.e. what it means to *apply* a norm. While the distinction between formal and material authorization is certainly apposite from a legal point of view, it is irrelevant from an epistemological and ontological perspective.

[8] *PTL1*, p. 56.

legal custom, in adjudication no less than in contracts. This tenet clears the way for viewing the act of positing the law as the core of legal objectivation in a theory of *positive* law. Yet how far does Kelsen's analysis of the law-setting go in meeting the challenge of natural-law doctrines?

His central insight is well known: "[L]egal acts are acts of both law creation and law application. With each of these legal acts, a higher-level norm is applied and a lower-level norm is created."[9] The distinction between norm creation and application is decisive, as we shall later see, for developing a concept of objectivation capable of overcoming natural-law doctrines. In effect, Kelsen can be construed as saying that while application is a necessary condition of legal objectivity, it is not a sufficient condition thereof; norm creation is also a condition of objectivity. But in what way?

Closer analysis suggests that in the same stroke by which Kelsen opens the way toward an alternative to natural-law doctrines, he also conceals it. For the terms in which the Pure Theory construes the distinction between law application and law creation are entirely congenial to natural-law doctrines. Indeed, if the legal act *produces* a lower-level norm, does it not by the same token *reproduce* the higher-level norm? To be sure, in his theory of interpretation Kelsen views legal norms as providing only a 'frame' of normative possibilities, such that legal authorities enjoy discretion in applying any one of these possibilities.[10] Clearly, however, the recourse to the metaphor of a 'frame' does not do away with a purely reproductive concept of norm application; it merely relaxes, without dissolving, the strictures imposed by natural-law doctrines. In effect, this metaphor functions in the Pure Theory in the same way as does the 'measure' of law in natural-law doctrines. Not only must the posited norm 'fit' within the frame to be objective, but the objectivity of the posited norm is also guaranteed by the fact that the frame exists independently of its applications.[11] By equating reproduction to the

[9] *PTL1*, p. 70. Kelsen excludes two borderline cases from this correlation, namely the presupposition of the basic norm that, by definition, does not apply a higher norm and the act of applying a sanction, which does not create a new norm.

[10] See, among others, *PTL1*, §36, and *PTL2*, §45(d).

[11] Kelsen's reference to the 'constitutive' character of adjudication does not parry this objection either. Adjudication is 'constitutive' merely in the legal sense

application of a higher-level norm, and production to the creation of a lower-level norm, Kelsen inadvertently brings on board the very concept of representation he was concerned to jettison from legal positivism.

What explains Kelsen's reticence to abandon the reproductive character of norm application, a reticence that stands in sharp contrast to his theoretical boldness concerning the basic norm? The answer, I submit, is an elemental feature of legal objectivity that natural-law doctrines are keenly aware of, namely that without reproduction there is no norm application, and without norm application it makes no sense to speak of the norm posited by a legal authority as being objective. In effect, a purely productive act of law-setting would be entirely subjective. Yet if purely reproductive, as required by metaphysical dualism and the copy theory of knowledge, law-setting is tantamount to another form of subjectivism, namely the legal perpetuation of a particular set of values. In both cases, a theory of positive law that could respect the contingency of law without effacing the difference between objectivity and subjectivity remains beyond our grasp.

At this junction, I propose to disjoin what the Pure Theory treats as inseparable, namely the theory of the basic norm and an inquiry into the act of setting the law. However fascinating and audacious, Kelsen's basic norm simply does not do the trick in meeting the principled challenge posed by natural-law doctrines. In contrast, Kelsen's insight that the act of positing the law has a single structure not only moves on the same plane of generality as that of natural-law doctrines, but, by arguing that validity accrues to norms as posited norms, it also holds promise of an alternative concept of legal objectivation. In particular, the task at hand consists in radicalizing Kelsen's intuition concerning the twofold character of law-setting. Whereas Kelsen views reproduction and production as pertaining to two *different* norms, the higher- and lower-level norms, respectively, could the act of positing a norm reproduce and produce the *same* norm, namely the *applied* norm?

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that the judge must determine whether the general legal norm is constitutional, not in any epistemologically strong sense (see *PTL2*, §35[g.$\alpha$]). Moreover, if the term 'constitutive' is used in an epistemologically strong sense, then *all* acts of legal objectivation, not merely adjudication, would be constitutive.

## 2. SETTING THE LAW AS TRANSFORMATION

To answer this question we must consider afresh the concept of representation. For this concept forfeits its epistemological and ontological significance at the hands of the Pure Theory. More concretely, I will sketch out the main lines of a concept of representation that draws on Kant's critical philosophy and, especially, on Ernst Cassirer's philosophy of symbolic forms. Both, of course, are household names to Kelsen. On one interpretation, patronized by Kelsen himself, the basic norm is inspired in Cohen's reception of Kant's philosophical project. Early on, Kelsen also refers to Cassirer's distinction between 'substance' and 'function' as fruitful for a legal theory of the state.[12] But in a later letter to Renato Treves, Kelsen adds a telling remark: "[T]he Pure Theory of Law . . . resolved this concept [of the person] in the spirit of Kantian philosophy, where all substance is reduced to function. Cassirer, one of the best of the Kantians – while he was a Kantian – has shown this in his fine book."[13] By implication, Cassirer's later work relinquished the aforementioned distinction and no longer deserved the 'quality predicate' of Kantian philosophy. I will not engage in the sterile debate about whether or not Cassirer was a neo-Kantian. It suffices, for my purposes, that Cassirer's early book links the distinction between substance and function to two competing concepts of representation, and that a chief endeavor of the three-volume *Philosophy of Symbolic Forms* consists in elucidating and applying a critical concept of representation to diverse fields of human activity.[14] Significantly, however, Cassirer did not investigate

[12] See Hans Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses von Staat und Recht* (Aalen: Scientia Verlag, 1981), p. 212.

[13] Hans Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism: A Letter to Renato Treves", trans. Stanley L. Paulson and Bonnie Litschewski Paulson, in Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Clarendon Press, 1998), pp. 169–175, p. 174.

[14] For Cassirer's early reference to representation, see his *Substance and Function and Einstein's Theory of Relativity*, trans. William C. Swabey and Marie C. Swabey (Chicago: The Open Court Publishing Company, 1923), p. 280ff. See also the Foreword to volume 1 of Cassirer's *The Philosophy of Symbolic Forms*, trans. Ralf Mannheim (New Haven, CT: Yale University Press, 1955–57), pp. 69–

positive law in terms of the representational structure of legal norms. Accordingly, Kelsen and Cassirer can engage in mutual collaboration, albeit in a way unsuspected by both philosophers. Whereas Cassirer leads the way in reconsidering the representational character of law-setting, an analysis of this act, as required by Kelsen, opens up positive law to Cassirer's philosophy of symbolic forms.

### 2.1 *The Copernican Turn of Representation*

It is no mean irony that precisely the fundamental tenet of Kant's critical philosophy provides the strongest possible argument for reexamining the concept of representation. Consider the following passage from an important text of what Paulson calls the neo-Kantian period of Kelsen's classical phase:

> While positivism denies to itself any natural law speculation, that is to say, any attempt to recognize a 'law in itself' [*Recht an sich*], it confines itself to a theory of positive law. Thus positive law is taken solely as a human product, and a natural order inaccessible to human cognition is in no wise considered as necessary for its justification.[15]

By dismissing out of hand the attempt to cognize a 'law in itself,' Kelsen evokes, of course, Kant's thesis that the 'thing in itself' is unknowable. Yet far from banishing representation from critical philosophy, Kant's thesis radicalizes this concept. In effect, rejecting the possibility of cognizing the *Ding an sich* is another way of saying that objectivity has a strictly representational structure. The real – presence – is only intelligible for human beings when it stands for something else, a 'form.' Human beings cannot apprehend the sheer presence of an absolute reality because sheer presence is unintelligibility *slechthin.* Declining a copy theory of knowledge, 'dogmatism' as Kant calls it, requires recognizing that the human cognition of reality is representational through and through. Thus, the critical turn in philosophy implies that, for cognition, there is *no presence without representation*.

If Kant's *Critique of Pure Reason* explores this tenet in the framework of an inquiry into the scientific cognition of natural

72, p. 69, where Cassirer remarks that this three-volume work generalizes the approach first developed in *Substance and Function.*

15 *NLD*, p. 435.

reality, Cassirer's philosophy of symbolic forms expands and casts it into a general theory of the conditions of objectivity. Like science, Cassirer argues, activities so disparate as myth, language, religion, technology, and art are all ways of rendering reality intelligible, of objectifying it, of transforming 'chaos into order.'[16] He underscores the relational character of objectivity, noting that to objectify reality is to go beyond or surpass the particular – 'matter' –, relating it to the general – 'form.' Cassirer also explains the formal or general moment of objectivity by suggesting that the objectifying act requires a 'point of view' whence the real can be differentiated and, being differentiated, understood. The concept 'book,' for example, allows us to look for and pick out certain things as books, that is, as things that instance – represent – this concept. Representation conditions the absoluteness of reality, for, when made to stand for a form, the real manifests itself as grounded, as objective. In this radical sense of the term, representation is a *conditio humana*.

Accordingly, the Copernican turn of representation marks the demise of metaphysical dualism and a copy theory of knowledge. Chapter 6 of Cassirer's *Substance and Function*, significantly titled 'The Concept of Reality,' opens with the following sentence: "[T]he characteristic procedure of metaphysics [consists] . . . in separating correlative standpoints within the field of knowledge itself, and thus transforming what is logically correlative into an opposition of things."[17] It is no coincidence that this is the chapter in which Cassirer distinguishes two concepts of representation, one that separates presence and representation, and another that views these as a unity. Overcoming metaphysics and a copy theory of knowledge in the legal domain requires understanding that, although we can distinguish between presence and representation, matter and form, this distinction abstracts from their more original unity. Critical philosophy is *monistic*, for it postulates the priority of the relation between presence and representation. This insight contributes to a philosophical justification of what I earlier called the *Faktum* of the law. That legal norms do not stand 'alone' has nothing to do with a

[16] Ernst Cassirer, "Mythischer, ästhetischer und theoretischer Raum", in Ernst Cassirer, *Symbol, Technik, Sprache* (Hamburg: Felix Meiner Verlag, 1985), pp. 93–111, p. 101.

[17] Cassirer, *Substance and Function* (n. 14 above), p. 271.

special feature of such norms, or even of norms in general, but with the fact that representation is a condition of objectivity.

In this context, Cassirer's analysis of representation casts Kelsen's concept of validity in a new light. In Kelsen's words, "to speak . . . of the 'validity' of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given . . . "[18] Because a legal norm is given as posited, as the application of a higher-level norm, Kelsen's definition of validity effectively asserts that representation is the manner of 'givenness' or existence proper to legal norms. A posited norm objectifies a state of affairs that requires legal ordering – 'matter' – by relating it to a higher-level norm – a 'form.' Hence, the norm posited by a legal authority exemplifies what Cassirer termed a "concrete unity of presence and representation."[19] Here is the legal manifestation of what Kant called an 'object,' and Cassirer a 'symbol.' In Cassirer's terminology, the distinction between the applied norm and its applications is not a *distinctio in re*, as assumed by a copy theory of knowledge, but a *distinctio rationis*.[20]

Finally, a critically informed concept of representation suggests the need to negotiate a 'middle way' between natural-law doctrines and the Pure Theory. The former reify the values embodied in a legal order by granting them a transcendent status. The latter's 'formal, dynamic' basic norm counters this hypostasis by severing the objectivity of positive law from the representation of values. Notice that a deeper communion joins these two strategies: both separate a unitary structure – the legal representation of values – into its two independent terms. In terms of the definition of metaphysics outlined in *Substance and Function*, the appeal to the basic norm turns out to be every bit as metaphysical as natural-law doctrines. A critical theory of law inspired in Cassirer's analysis of representation steers clear of both manifestations of this single metaphysical

[18] *PTL1*, p. 12.

[19] Ernst Cassirer, *The Philosophy of Symbolic Forms*, vol. 3 (n. 14 above), p. 129.

[20] Ibid. Cassirer thereby generalized and radicalized Kant's famous dictum about the structure of appearance, namely that "thoughts without content are empty, intuitions without concepts are blind" (Immanuel Kant, *Critique of Pure Reason*, trans. Norman K. Smith [Hong Kong: Macmillan Education, 1987], A51, B75).

strategy. Against the hypostasis of values into a 'natural order' independent of the legal order, a critical theory of law is a theory of positive law. Against the Pure Theory, it argues that the representational structure of legal norms determines the positivity of the law. A legal norm is always a posited norm, and as such, a representation of a higher-level norm and, ultimately, of values held to be constitutive for a legal order.

But if every legal norm represents values, and every value is particular, does not this proposed 'middle way' boil down to rendering such values *absolute*? Even if one grants that the representation of values is a condition for the objectivity of legal norms, how can we avoid the danger discussed earlier, namely the legal perpetuation of a particular set of values? These questions are variations on the overriding problem of a theory of positive law, namely accounting for the distinction between objectivity and subjectivity in a way that recognizes the irreducible contingency of the law. To address this problem, a shift of perspective is required. Instead of discussing further the unity of presence and representation as constitutive of objectivity, let us now examine the process of objectivation: What determines positing the law as an *act*?

### 2.2 *The Dynamics of Objectivation*

The Pure Theory views the law as dynamic because it is a process of self-creation. The law creates itself in the ongoing process whereby general norms are rendered increasingly concrete, individual. But if, as we have seen, Kelsen's interpretation of the reproductive and productive character of the legal act is congenial to the presuppositions of natural-law doctrines, does it justify speaking about 'legal dynamics' in a *strong* sense? The distinction between 'statics' and 'dynamics' only takes on a strong sense if it refers to two competing conceptions of the act of setting the law. A static conception views this act as merely reproducing the norm it applies, whether or not the posited norm 'completes' the applied norm by adding individualizing features to it. By this criterion, the Pure Theory espouses a static interpretation of positing the law. What, then, is a dynamic conception of this act?

The key to this question lies in the 're' of representation. If we reject the idea that this prefix means the duplication of an original,

then to represent means literally to present *again*. On this reading, representation is a *process*, namely a context-bound iteration. Two cardinal implications flow from this insight. First, presenting 'again' means that each objectifying act links up to *foregoing representations*, not to an original. The series of acts whereby a 'form' is presented time and again does not take its point of departure in a pure presence. There is no 'original' of, for instance, a book; what we have is a sequence of human actions that treat things as books. Second, the same form is rendered present in different things: this book, that one, etc. Repetition introduces a *difference*, however minimal, with respect to earlier representations. As Bernhard Waldenfels puts it, "Repetition is the return of what is different as the same."[21]

The 'difference' introduced by repetition is of the utmost importance for understanding the dynamics of objectivation. In effect, reality is only intelligible when differentiated, and this implies that every ordering or objectifying principle includes some aspects of the real as relevant and excludes others as irrelevant. In Cassirer's words, the chief task of an order is to "limit the unlimited, to determine the relatively indeterminate."[22] What a form excludes as irrelevant does not, however, simply disappear; it remains as the latent meanings of the real – presence – that can become relevant in another context. Although there is no presence without representation, presence is always *more* than what it represents. Presence retains a 'surplus' of possible meanings with respect to the meaning projected by the form. Consequently, no ordering principle succeeds in establishing itself definitively; the closure of the real anticipated by a form is never conclusive because what it shuts out retains a disruptive potential with respect to the form itself. From this perspective, the objectifying act is predominantly *reproductive* when what requires ordering 'fits' by and large into the 'measure' we call a form. In such cases, the ordering principle remains relatively unproblematic in the ongoing process of objectifying reality. Contrariwise, objectivation is *productive* when the real manifests

[21] Bernhard Waldenfels, *Ordnung im Zwielicht* (Frankfurt: Suhrkamp, 1981), p. 64 (my translation).

[22] Cassirer, "Mythischer, ästhetischer und theoretischer Raum" (n. 16 above), p. 100.

itself as disruptive or 'unruly,' when it challenges the relevance criteria – the 'measure' – projected by the ordering principle. In such cases, a new form is created in the process of objectifying reality.

Bear in mind, however, that the act of objectifying reality is neither purely reproductive nor purely productive of a form. In effect, both extremes presuppose the idea of an 'original.' A purely reproductive understanding of objectivation is, as we have seen, the implication of metaphysical dualism and the copy theory of knowledge. The second extreme, objectivation as a purely productive act, would dissolve the distinction between the ground and the grounded, between form and matter; it would be the *creatio ex nihilo* of – literally – an original that, in its sheer originality, would be unintelligible. Moreover, and no less importantly, the distinction between both types of objectivation is *gradual* rather than disjunctive. We speak of objectivation as being predominantly reproductive when the continuation of a form prevails over its creation, or as being predominantly productive when the creation of a form prevails over its continuation.

Being both reproductive and productive, the act of objectivation is *transformative*.[23] The term 'transformation' indicates that objectivation modifies a form. Hence, objectivation is a *dialectical* act: objectifying the real also modifies the principle of objectivation. This insight casts the entire discussion on representation in a new light. In effect, the act of objectifying reality is both representational and presentational. The continuation of form, its representation, is also, to a lesser or greater extent, the creation of form, its presentation. Giving Waldenfels's expression a new twist, objectivation, by reformulating the criteria of inclusion and exclusion anticipated in a form, also enables the return of what is the same as different. Accordingly, objectivation is dynamic because it unfolds a *dialectic of representation and presentation.*

I submit that positive law is dynamic in the sense described hitherto, i.e. that the act of positing the law unfolds a dialectic of representation and presentation. As noted in subsection 2.1, setting

[23] See Waldenfels, *Ordnung im Zwielicht* (n. 21 above), pp. 144–146, and his article "Der Logos der praktischen Welt", in Bernhard Waldenfels, *Der Stachel des Fremden* (Frankfurt: Suhrkamp, 1991), pp. 83–102, for the distinction between production and reproduction.

a legal norm objectifies a state of affairs that requires legal ordering – 'matter' – by applying a higher-level norm – a 'form.' This bare-bones description of the representational character of law-setting can now be fleshed out more fully. In effect, the higher-level norm includes some values and excludes others. Succinctly, setting the law (*Rechtssetzung*) is an instance of what Cassirer calls setting limits (*Grenzsetzung*).[24] Precisely because legal objectivation is only possible by means of a normative reduction, the values marginalized by the legal order – the 'illegal' in a broad sense – never lose the potential of disrupting this order. The 'measure' of the real, as anticipated by a higher-level norm, never exhausts the possible normative meanings of the real. Returning to the comments at the end of subsection 1.1, the 'conflict of representations' does not take place despite representation, but *because* of it. Indeed, the not-yet-legally-ordered – 'matter' – can manifest itself in one of two ways in the act of objectivation. At one end, we find the merely 'disordered,' which does not seriously contest the normative boundaries drawn by the applicable norm. At the other, we find the 'subversive,' in the broad sense of what disputes (explicitly or implicitly) the values protected by the applicable norm. The (gradual) distinction between these two modes of the not-yet-legally-ordered has its parallel in the act of setting the law, which is either predominantly reproductive or predominantly productive. Let me illustrate these ideas by successively considering legal adjudication and legislation.

Legal dogmatics distinguishes between standard cases, in which a legal court maintains a certain interpretation of a legal norm, and landmark cases, wherein legal courts create a rule. Whereas in the former the applicability of the legal norm is not seriously questioned, in the latter the state of affairs that calls for legal ordering renders the applicable legal norm problematic, leading the court to a new interpretation of this norm. The distinction between these two cases is not, however, absolute. On the one hand, every standard case requires at least a minimal reformulation of the general legal norm, given the changed context in which this norm must be applied (again). By implication, the change of direction laid down by a landmark case begins earlier, in the minor adjustments to the general

[24] *PTL1*, p. 56; Cassirer, "Mythischer, ästhetischer und theoretischer Raum" (n. 16 above), p. 100.

norm introduced in standard cases. On the other hand, a landmark case does not produce an entirely novel rule; the landmark case reformulates a legal norm, it applies a norm in a new way. For unless the norm it posits can be viewed as the application of a higher-level norm, the act of adjudication can raise no claim to objectivity. Thus, viewing the opposition between standard case and landmark case as rigid and unbridgeable boils down to viewing adjudication as being either purely reproductive or purely productive.

If it is tempting to overlook the productive aspect of law-setting in adjudication, the opposite temptation holds for legislation, namely forgetting its reproductive character. For by positing general norms, whether substantive or procedural, every legislative act also claims to carry forward values claimed to be constitutive for the identity of the community. Without this claim, legislation would forfeit its objectivity. To be sure, the ongoing debate about the meaning of such values, and how they should be given legal shape, is the very stuff of politics. But this simply indicates that, in a continuous confrontation with what requires legal ordering, the enactment of statutes can run the entire gamut from legislative fine-tuning to sweeping social reform. In both cases, the act of positing the law involves both the reproduction and the production of values.

In short, although Kelsen is right in calling attention to the productive and reproductive aspects of the legal act, the foregoing considerations suggest that positive law is dynamic in a far more radical way than he suggests. In effect, setting the law does not merely produce a lower-level norm in applying a higher-level norm. Law-setting is dynamic because this act partakes of the *dialectical* character of objectivation in general: positing a norm always transforms, to a lesser or greater extent, the applied norm. In other words, setting the law is an act at once reproductive and productive, representational and presentational.

## 3. A CONTROLLED TRANSGRESSION OF THE LAW

The problem of legal objectivity is, conceptually speaking, the ‘measure’ of the law, that is, the problem of the generality of the higher-level norms and, ultimately, of the values protected by the legal order. By transporting such values into a transcendent

sphere, natural-law doctrines attempt to grant them a universal status. Against natural-law doctrines, the Pure Theory asserts that the values applied in the enactment of (general) legal norms can be, and invariably are, contested in the political arena. While general with respect to its legal applications, no set of values can hope to gain universal allegiance. Kelsen is surely right on this point. But if he is, and if there is no legal objectivity without the representation of values, how can we at all make sense of positive law as being objective? Would we not have to accept that positive law, because contingent, is irreducibly subjective?

Notice that qualifying positive law as subjective because it is contingent implies that the 'measure' of objectivity is a set of values that could command universal allegiance. In a word, if we construe generality as meaning universality, then we can no longer distinguish contingency from arbitrariness. But need we equate generality with universality, and contingency with arbitrariness?

The twofold character of legal objectivation, as an act both representational and presentational, contests the conflation of these terms, suggesting the conditions under which positive law can be both contingent and objective. Let us begin with contingency. As we have seen, the act of setting the law differentiates reality by reproducing an ordering principle that includes certain values and excludes others. The distinction between the values included and excluded by the law is already 'there' before we can even begin to question the distinction. Without the normative closure of the real anticipated by a legal norm no legal objectivation would be possible. Hence, objectivation – the rational act *par excellence* – always comes too late; it is made possible by the residue of *a*rationality we call the contingency of the law. But if law begins as contingent in the act of legal objectivation, need it *end* as contingent? Does not the productive character of setting the law bear hope of a universally acceptable legal order, an order that could trade in its contingency for necessity? This, of course, is the conception of practical rationality in a Kantian vein, to which Kelsen was vehemently opposed. The foregoing analysis suggests that if legal objectivation comes too late in terms of the law's contingency, it also always comes too soon with respect to universality. In effect, the dialectical character of setting the law implies that the production of norms

and values also involves their reproduction. There is no 'disembodied' perspective, no 'neutral' point of view, whence it would be possible to discuss and establish which values deserve legal protection. Although objectivity cannot be conflated with the reproduction of values, there is no objectivity without such reproduction. For, as noted earlier, a purely productive act of setting the law reintroduces the idea of an 'original' into objectivity. Contingency is here to stay: the loss of an 'original' order represented in positive law also means the forfeiture of an 'original' order that could be merely presented by bracketing positive law.

If positive law is irreducibly contingent, need we also conclude that it is irredeemably subjective? As shown in section 2, legal objectivation is a dialectical act: positing a norm transforms, to a greater or lesser extent, the applied norm and, ultimately, the values positivized in the law, i.e. the *form* of law. Every legal norm anticipates a general way of dealing with situations, but this claim to generality goes together with the proviso 'until further notice.' That a state of affairs calling for legal objectivation does not significantly question the applicable norm simply means that the norm's generality remains by and large uncontested in the act of legal objectivation. Yet, as noted, the material ground of the law – the not-yet-legally-ordered – can subvert the applicable legal norm or value, exposing it as the expression of a particular interest. This is the experience of subjectivity to which every legal norm and value is continuously exposed. But this also means that, in such cases, setting the law is also called on to reformulate the meaning of the applicable legal norm, to search anew for a general criterion of inclusion and exclusion. Legal objectivation 'opens' the law in the same stroke by which it 'closes' the real. To put it in terms of Kant's famous distinction, the act of positing the law is never purely 'determinative'; it is also more or less 'reflective.' Positing the law not only 'subsumes' the particular under the general, but also has to 'find' the general beginning from the particular.[25] In its capacity to transform the norm it applies, the act of positing the law can be more than merely the perpetuation of a particular set of values.

[25] Immanuel Kant, *Critique of Judgment*, trans. Werner S. Pluhar (Indianapolis: Hackett Publishing Company, 1987), Ak 179.

This brings us back full circle to the *Faktum* of the law, as outlined in subsection 1.1. In view of the question how we should understand the relational character of norms, I noted at the outset of this paper that, from the point of view of norm application, such norms possess a representational structure. The analysis of legal objectivation suggests that this interpretation of the relational character of norms is incomplete for at least two reasons. First, the act of positing a norm creates the higher-level norm in the very act of applying it. If the administrative regulation represents the income-tax law, it is no less the case that the administrative regulation (and the tax inspector's order for payment) presents the income-tax law, revealing its general meaning in the concrete context in which it must be applied. Representation and presentation, norm application and norm creation, are the two conditions of legal objectivity. Second, legal objectivation demands that we view the hierarchy of legal norms as *two-way* rather than one-way. For if a hierarchical relation denotes a relation of dependency, then the applied norm is both 'higher' and 'lower' than the posited norm. In effect, whereas the posited norm depends on the applied norm to be objective, the applied norm depends on the posited norm to reveal its general meaning, a meaning that must be renewed time and again.

Accordingly, objectivity in the law cannot be explained in terms of 'either' the reproduction of an applicable norm 'or' its production, but rather as both. Kelsen is right in arguing that the conditions of legal objectivity are the conditions of legal dynamics, if by dynamics we understand the dialectics of setting the law. There is no objectivity without the continuation of an ordering principle, yet only the reformulation of this ordering principle, in confrontation with what subverts the law, preserves a legal order from reification and arbitrariness. It would seem, therefore, that in response to what questions and contests the legal order from without, positing the law is a controlled transgression of the law from within. This act *transgresses* the law because what does not fit into the law can only be brought into the order by reformulating the normative criteria consigned in the applicable norm. But positing the law is also a *controlled* transgression of the law, for at stake in this act is the continuation of order, not its abandonment. Recast in this way, Kelsen's remarkable insight, "the law is valid only as positive law,

that is, only as law that has been issued or set," can account for the distinction between subjectivity and objectivity while respecting the contingency of positive law.

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